In Re Holocaust Victim Assets Litigation regarding the Application of Bu...uborne for counsel fees Doc. 91

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE: HOLOCAUST VICTIM ASSETS LITIGATION FEE APPLICATION OF BURT NEUBORNE	MASTER DOCKET NO. CV. 06-983 (FB)(JO) **OBJECTIONS OF U.S. HOLOCAUST SURVIVORS AND CLASS MEMBERS TO MAGISTRATE'S REPORT AND RECOMMENDATIONS CONCERNING LEAD SETTLEMENT COUNSEL'S ATTORNEYS FEES**

Objectors-class members David Schaecter, Leo Rechter, David Mermelstein, Alex Moskovic, Esther Widman, Fred Taucher, Jack Rubin, Henry Schuster, Anita Schuster, Herbert Karliner, Lea Weems, Israel Arbeiter, Sam Gasson, "G.K.," "L.K.," "F.K.," "D.B.," and "J.R," Nesse Godin, and the Holocaust Survivors Foundation-USA, Inc. (HSF) (henceforth referred to as "Objectors" or "US Survivor class members"),[1] through undersigned counsel, pursuant to 28 U.S.C. Section 636(b)(1) and Federal Rule of Civil Procedure 72, object to the Magistrate's Report and Recommendation dated March 15, 2007 concerning the fee request of Burt Neuborne, Esquire. Objectors briefly summarize the grounds for their objections in this filing, and adopt and incorporate the relevant arguments filed in their March 17, 2006 and July 21, 2006 submissions and relevant exhibits referenced therein in support of these objections.

[1] "G.K.," "L.K.," "F.K.," "D.B.," and "J.R." are Holocaust Survivors who receive subsidized social services through Jewish social service agencies in South Florida, whose benefits are inadequate to meet their prescribed medical and other service needs.

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1. Notice to the class was not sufficient under Rule 23(h) and Local Rule 23.1 requires a hearing on the fee request. The Survivors who are objecting to Mr. Neuborne's fees are members of the Swiss Bank Looted Assets class. They have participated in this litigation for several years, as claimants, and in their efforts to secure a fairer distribution of settlement proceeds. Their goal has been to ensure that a fair portion of the Looted Assets class funds be distributed to class members in the United States, thousands of whom are poor and in need today, and thousands of whom will be poor and in need tomorrow. Many of the Objectors attended hearings in this case, participated in meetings and phone conferences with the Lead Counsel, Special Master, and the Court, and were even present in a federal court hearing which Mr. Neuborne attended and spoke on behalf of objectors in that case. They, and others who would likely come forward if a notice disseminated announcing a hearing have a right to speak, have right to address this Court in person and express their reasons for opposing the requested fee.

The U.S. Survivors object to the Magistrate's conclusion that the requirements of class notice under Rule 23(h) have been satisfied, and that Rule 23.1 of the Local Rules of the Eastern District of New York does not require a hearing on Mr. Neuborne's request.[2] Objections of Class Members to Request by Lead Settlement Counsel for Attorneys Fees and Request for Hearing (March 2006 Objections), at 7. The U.S.

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[2] Contrary to the Magistrate's conclusions, the U.S. Survivors did not abandon their position that notice to the class was required in a manner that would "inform class members of their right to object or comment on the fee request, the address for submitting their comments, a deadline for submissions, and the date, time, and place of [a] hearing." Objectors' July 21, 2006 Letter Brief in Opposition ("July 2006 Letter Brief") reiterated their position and cross-referenced their arguments from their March 17, 2007 Objections, at 1 and note 1.

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Survivors adopt and incorporate their arguments from pages 3-9 of their March 2006 Objections herein.

Rule 23(h)(2) provides that "a class member, or a party from whom payment is sought, may object" to class counsel's motion for attorneys fees. Contrary to the Magistrate's findings, the widespread publicity surrounding Mr. Neuborne's fee request does not satisfy the underlying purpose of the rule – to allow class members to bring their individual perspectives before the Court on the fee request. Nor did Mr. Swift's opposition obviate the individual rights of class members to be notified about the details of the request and speak for themselves, from their own perspective, about the pending request.

Similarly, the Magistrate erred in his holding that no hearing was required on Mr. Neuborne's fee request under Local Rule 23.1. The Magistrate's reasoning that Mr. Neuborne's compensation as "Lead Plaintiffs Settlement Counsel" is grounded on a different basis than an award as "class counsel" is erroneous. The recommendation erroneously posits that the Court can pay Mr. Neuborne from class settlement funds for his work related to the distribution of the funds, but that such an award somehow is not based "upon recovery or compromise in a . . . class action on behalf of a . . . class."

One of the most disappointing aspects of the Magistrate's order is the implication that the Holocaust Survivors making these objections might not actually believe that Mr. Neuborne had claimed to work pro bono for the entire case, *including the allocations phase* of the case. The Report states:

> In short – it is possible, though not likely – that a casual observer of Neuborne's statements over the years could have mistakenly concluded that Neuborne had

> explicitly foreclosed the possibility that he would seek compensation for his work as Lead Settlement Counsel. It is conceivable – though far less likely – that highly interested observers such as the Objectors could honestly have come to the same conclusion.

Report and Recommendations, at 41. Putting aside the question of how the Magistrate might have reached such a conclusion about these class members' subjective beliefs, such an implication is wrong and this Court need only hold a hearing at which the Objectors could speak for themselves, as they have requested from the beginning, to ascertain the error in the Magistrate's unfortunate statement.

2. Mr. Neuborne's fee request is barred by judicial estoppel. On the overriding question of judicial estoppel, the Magistrate acknowledges that Mr. Neuborne should have disclosed at an earlier time in court that he was no longer working pro bono, but concludes that the overall context of his statements do not meet the legal standard of judicial estoppel. Yet in rejecting the U.S. Survivors' judicial estoppel argument, the Magistrate completely fails to address the U.S. Survivors' central point – that Mr. Neuborne argued in his court filings that his pro bono status as Lead Settlement Counsel was integral to the allocations process as well as the settlement itself, and would ensure the fairness of the allocations themselves.

This omission is visible from the outset of the Magistrate's discussion of the judicial estoppel issue, and undermines the Magistrate's entire analysis and conclusions. In analyzing the statements Mr. Neuborne made which the U.S. Survivors cite in support of their argument, the Magistrate says:

> "I am guided by the general description that Dubbin has provided in articulating the substance of his estoppel argument:

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> Mr Neuborne has repeatedly represented that he is serving as "Lead Plaintiffs' Settlement Counsel" on a "pro bono" basis, or "without fee," or having "waived fees." Those representations were made in this Court, in the Second Circuit Court of Appeals, and in the U.S. District Court for the Southern District of Florida, and in numerous publications.

Dubbin Initial Memo, at 10.

Unfortunately, in characterizing the U.S. Survivors' objections, the Magistrate omitted the very linchpin of the estoppel argument. The entire statement, including the sentence omitted by the Magistrate, reads as follows:

> Mr Neuborne has repeatedly represented that he is serving as "Lead Plaintiffs' Settlement Counsel" on a "pro bono" basis, or "without fee," or having "waived fees." Those representations were made in this Court, in the Second Circuit Court of Appeals, and in the U.S. District Court for the Southern District of Florida, and in numerous publications. *Those representations have been integral to Mr. Neuborne's arguments justifying the entire settlement scheme, including the current allocation, and his opposition to the U.S. Survivors' efforts to obtain a greater allocation of Looted Assets Class settlement funds in this case.*

March 2006 Objections, at 10-11. The italicized language is the language the Magistrate omits in characterizing the U.S. Survivors' position. In 105 pages, the Magistrate does not address the heart of the U.S. Survivors' estoppel argument.[3]

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[3] To the extent the Magistrate addresses the "context" of the statements the U.S. Survivors cite, he misconstrues that very context. Rather than acknowledge that Mr. Neuborne said he was working pro bono for the settlement *and allocation* phases, the Magistrate states: "Second, and more compelling, the statement can be read only by divorcing it from the context of the many other statements in the same document that make clear the fact that Neuborne's fee waiver was meant to apply only to his work in securing the settlement." Report and Recommendations at 39. Objectors respectfully disagree with this assessment and believe the Court will also disagree in its *de novo* review..

This Court must review the judicial estoppel issue *de novo*, 28 U.S.C. Section 636©)(2). In support of reversal, the U.S. Survivors' adopt and incorporate herein their judicial estoppel argument currently set forth at pages 1-9 of the U.S. Survivors' July 21, 2006 Letter Brief in Opposition ("July 21 Letter Brief"), and in at pages 10-27 of the Objections of Class Members to Request by Lead Settlement Counsel for Attorneys Fees and Request for Hearing, March 17, 2006 (March 17 Objections").

3. Fees as "general counsel." The Magistrate erred in allowing Mr. Neuborne fees for his role as "general counsel" to the settlement fund. The Magistrate's recommendation, if adopted by the Court, would create an entirely unprecedented position of "general counsel to the Court" whose loyalty would be to the Court itself but whose compensation would be paid from class members' funds. Therefore, if this Court determines that there is no estoppel, it should nonetheless reduce the hours by the 800 hours stipulated to belong in this category, for the reasons stated at pages 14-16 of the Objectors July 2006 Letter brief, which are adopted and incorporated herein.

4. Hourly Rate. The Magistrate erred in rejecting the legal authorities and factual materials cited by the U.S. Survivors in their July 2006 Letter Brief. Those materials provide the necessary legal authority and factual background to reduce the requested hourly rate by which Mr. Neuborne could be compensated, if indeed compensation is permitted. The Survivors adopt and incorporate their arguments from pages 9-14 of their July 2006 Letter Brief on this point and the exhibits submitted thereto as supporting the Magistrate's reduction of the applicable hourly rate, and as supporting a reduction as low as $200 per hour.

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5. Any Fees Should Be Limited to Work Expended which Actually Generated A Financial Benefit. The U.S. Survivors object to the Magistrate's conclusion that Mr. Neuborne can recover for work that did not generate a monetary benefit to the class. This is the standard he urged for other attorneys and which the Court adopted. The U.S. Survivors adopt and incorporate their arguments at pages 34-40 of their March 2006 Objections and page 17 of their July 2006 Objections in support of this point.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by electronic mail upon Samuel Issacharoff, Esquire, counsel for Burt Neuborne, 40 Washington Square South, New York City, New York, 10012 this 17th day of March, 2006, and Robert A. Swift, Esquire, Kohn Swift & Graf, One south Broad Street, Suite 2100, Philadelphia, PA 19107, this 29th day of March, 2007.

By: Samuel J. Dubbin, P.A.
Samuel J. Dubbin, P.A.